

*United States Court of Appeals*  
*for the*  
*District of Columbia Circuit*



**TRANSCRIPT OF  
RECORD**



# **TRANSCRIPT OF RECORD.**

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**Court of Appeals, District of Columbia**

**APRIL TERM, 1909.**

**No. 2006.**

**586**

**MOORE & HILL, INCORPORATED, APPELLANTS,**

*v.s.*

**LEWIS E. BREUNINGER.**

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**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA**

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**FILED APRIL 14, 1909.**

# COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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vs.

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# In the Court of Appeals of the District of Columbia.

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No. 2006.

MOORE & HILL, Incorporated, Appellants,  
*vs.*  
LEWIS E. BREUNINGER.

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a Supreme Court of the District of Columbia.

No. 49418.

MOORE & HILL, Incorporated, a Corporation,  
*vs.*  
LEWIS E. BREUNINGER.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill of Particulars.*

Filed May 7, 1907.

In the Justice's Court of the District of Columbia.

Before Robert H. Terrell, Justice.

No. 10523, 49418.

MOORE & HILL, Incorporated, a Corporation,  
*vs.*  
LEWIS E. BREUNINGER.

Lewis E. Breuninger to Moore & Hill, Incorporated, Dr.

Commission on sale of house 1234 Irving Street, at 3%, \$7000.00 .....	\$210.00
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*Memorandum.*

October 27, 1908.—Verdict for defendant.

1—2006A

Supreme Court of the District of Columbia.

FRIDAY, November 13th, 1908.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

\* \* \* \* \*

By Judge Anderson.

No. 49418. At Law.

MOORE & HILL, Incorporated, Pl'ff,  
vs.

LEWIS E. BREUNINGER, Def't.

Upon consideration of the motion for a new trial filed on behalf of the plaintiff, it is ordered that said motion be, and the same is hereby overruled; and judgment on verdict is ordered. Thereupon, it is considered and adjudged that the plaintiff herein take nothing by this action, that the defendant go hereof without day be for nothing held and recover of plaintiff and Fidelity and Deposit Company of Maryland their surety, the costs of defense to be taxed by the clerk, and have execution thereof.

From the foregoing the plaintiffs by their attorney in open court, note an appeal to the Court of Appeals, whereupon a bond for costs on such appeal is hereby fixed in the penalty of One Hundred Dollars.

*Memorandum.*

November 28, 1908.—Appeal bond filed.

*Memorandum.*

Time to submit exceptions extended to March 8, 1909, and to file transcript in Court of Appeals to March 12, 1909.

Supreme Court of the District of Columbia.

MONDAY, March 8th, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice presiding.

\* \* \* \* \*

By Judge Anderson.

No. 49418. At Law.

MOORE & HILL, Plaintiff,  
vs.

LEWIS E. BREUNINGER, Def't.

Comes now plaintiff by its attorney of record and submitting to the Court the Bill of Exceptions taken at the trial of this cause, prays

that the same be now signed and made of record *nunc pro tunc*, which is hereby accordingly done.

4

*Bill of Exceptions.*

Filed March 8, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 49418.

MOORE & HILL, Incorporated,  
*vs.*  
LEWIS E. BREUNINGER.

Be it remembered that the above entitled cause came on for trial before Mr. Justice Anderson and a jury on the 26th day of October, A. D., 1908, Whereupon the plaintiff to maintain the issues on its part joined, offered as a witness A. S. GARDNER, who testified as follows:

That he was employed by Moore & Hill, incorporated, real estate agents in the District of Columbia, and had been employed by said firm for the past two and one-half years as a salesman; that he has known the defendant, Breuninger, since a short time previous to December, 1906, when he had some business relations with him; Mr. Breuninger built several houses in a row between 11th and 13th streets, on the south side of Irving, and witness sold two of those houses previous to the one mentioned in this suit, within three weeks previous to the time that Mr. Shepard called in the office of Moore & Hill to inquire about a house; Moore & Hill had the agency for selling those two houses. One of those houses was sold at \$6750, and the other for something like \$6900;  
5 those houses were identical to the house mentioned herein.

Q. Now, Mr. Gardner, did you have anything to do with calling Mr. Sheppard's attention to house 1234 Irving Street? A. Yes, sir.

Q. Just tell us about the date, as near as you can. A. On the evening of December 22, 1906, between 4:30 and 5 o'clock in the evening, he inquired about a house which was advertised in the Star.

Q. What day of the week was that, do you know? A. I don't recall, no sir, and I gave him the number of it, and he said that particular house did not suit him. There were two or three, and he said none of those suited him, and he preferred to get a new house, and owing to the fact I had just sold a couple of these houses, I had them in my mind, and I called his attention to those same houses, and he said, "I would like to see them." I immediately took him out in the machine and took him up and went through these houses with him, and he expressed himself that he liked the houses very

much, and would like for his family to see them. I then took him back home and made an agreement that he and his family should go up the following Sunday. The following Sunday morning I called at his house and took him and his wife and two sons and went through the house, and he said, that, being Sunday, he would not make a proposition that day, but call at his office Monday morning and he would make a proposition on the house.

6       Monday morning I went to his office, and instead of making a sale proposition, he made a proposition to exchange his house 1531 10th Street, Northwest, for this particular house. He put his house in at \$4,500.00, and at that time he put up \$75.00 deposit to show good faith in his being willing to make this exchange. But I put this to Mr. Breuninger, and Mr. Breuninger said he would not consider an exchange on the property. There were several controversies back and forth for three or four days. We could not get together on the exchange. Then I went to him and asked him if he would make a cash proposition. He said he was not prepared to do it at that time because he did not have the money to pay for the house until he sold the one on 10th Street or put that in exchange for another house, and a few days after that, or the next day, I believe, I returned him his \$75.00 that he put up. About three days after that I went back to see him—

Q. Was this in January, 1907? A. In January, yes, 1907. A few days after that I went back to see him again to see if he had sold his house or had found any way in which he could buy this particular house, and I went in the office. He remarked that he had bought a house. I said, "Is that so? What did you buy?" He said, "That house you showed me." I said, "Who did you buy it from?" He said, "I bought it from the owner." I said, "Why did you do that?" He said, "Because I could save your commission." I said, "I am very glad you like the house and very glad you got it," and left him and went out of the office.

7       Q. Did Mr. Sheppard, when he came to see you, say anything about having seen the house before? A. No, sir.

Q. Did he say anything to you at all about his idea of making a trade until after this Sunday? A. No, sir. There was not a word mentioned about the trade until I walked in his office on Monday morning, and then he said that he and his wife had talked the matter over and they decided they could not buy a house until they had either sold the house or put it in part payment.

Q. What were the terms upon which the houses were for sale? A. They were open to proposition.

Q. What was the asking price? A. He was asking \$7,000 and they were offered, and understood they could not be bought for less.

Q. You went to Mr. Breuninger, you say, with this offer you had from Mr. Sheppard? A. Yes sir.

Q. Did you tell Mr. Breuninger for whom you were asking? A. I did, yes sir. I told him the name of the party, and at the same time gave the number of the house which the party owned so that it could be brought to his attention.

Q. Did you ever receive any commission on that house? A. No sir.

8 Q. Did you have any further conversation with Mr. Shepard or Mr. Breuninger? A. No, sir, not until later. I then went back and told Mr. Hill of my firm—

The COURT: You cannot state what you told Mr. Hill.

Mr. LAMBERT: I do not care anything about that.

By Mr. LAMBERT:

Q. Did you write to Mr. Breuninger yourself? A. No sir.

Q. Do you know when it was that the property was conveyed by Mr. Breuninger to Mr. Shepard? A. I do not, not the exact date, no sir.

Q. What was the house sold for? A. That I could not say. I asked him what he bought it for, and he declined to tell me. I think in the other court it was proven it was sold for \$6,900.

Q. He stated that, did he? A. In the J. P. Court, if I am not mistaken.

Q. \$6900? A. Yes sir.

On cross-examination the witness testified as follows:

Q. You say Moore & Hill had the agency for the sale of these houses? A. Yes sir.

Q. How did they get it? A. From Mr. Breuninger.

Q. Did he give them authority? A. He did.

9 Q. Did you get it in writing, or verbally? A. Verbally.

Q. Who got it, did you get it? A. I got it in this way, that I had sold houses, some of the identical same houses in the same row previous to this time, in fact, a week previous to this, one of the houses for Mr. Breuninger, and he accepted the contract and agreed to pay me the commission on that.

Q. That is the only way you got it? A. No, previous to that, if I am not mistaken, he called in the office and offered them for sale, and it was generally understood—

Q. I do not want the general understanding, but what you know about it. A. At that time whatever houses Mr. Breuninger had for sale—

Q. I want what he told you. A. He said whatever houses I would sell for him he would give me 3 per cent. commission on them.

Q. Anything else? A. Not at that time, no sir.

Q. Any other time? A. No sir.

Q. Then that remark you made that the houses were opened to propositions was something that you conjured up yourself; he did not tell you that? A. Yes, he did, he told me that the asking price of the house was \$7,000. He said that the house was open to a proposition, and that any proposition that I could get for the house not to turn it down, but to bring it and submit it to him.

10 Q. He told you that, then? A. Yes sir.

Witness further testified as follows:

Q. What sale of it did you negotiate? What agreement did you make to sell the property and bring up to Mr. Breuninger? A. The exchange proposition. He agreed to allow the full price of the house on Irving Street, which was \$3,000.00 and put his house in on 10th Street, which was \$4,000.00.

Q. Is that the only way you sold the house, by bringing that proposition to Mr. Breuninger? A. That is the only one I took up to him. There were others, and I asked him if he would consider another, and he said no, he would not want to consider an exchange at all.

Q. Had you been authorized to consider any other proposition on that house? A. No, sir. He said any proposition I could get not to turn it down, but to submit it to him.

Q. The only proposition you submitted, then, was this trade proposition? A. Yes, sir.

Q. What was turned down by Mr. Breuninger promptly? A. Yes, sir.

Q. What sale did you negotiate then? A. What sale did I?

Q. Yes, in accordance with any contract that you had  
11 with Mr. Breuninger, what sale did you offer him which he  
was under any obligation to accept? A. I offered to sell this  
particular house for him if he would take as part payment the house  
on 10th Street.

Q. And you had never been authorized to get an offer of that kind? A. He simply said any offer we could get to make it to him. He did not say trade or straight sale.

Q. As a sale proposition, you were told if you got \$7,000.00 for the property he would sell it, were you not? A. Yes, sir.

Q. And you understood if you brought a purchaser ready to buy and pay \$7,000.00 he would accept an offer? A. Yes, sir.

Q. That is the only authority you had to sell? A. Except when he told me personally, when I sold two other houses, he says, "Now, Mr. Gardiner, any other proposition you can get on any of the other houses, bring it to me and submit it."

The witness then stated further that the asking price of the house was \$7,000.00 and submit propositions; but Breuninger said he would take a less price for that, that he, witness, had gotten a proposition twice previous to this on other of these houses and submitted them to Breuninger in which he accepted less than \$7,000; and testified as follows in regard to the sale of this house:

Q. Did you offer any other proposition to Mr. Breuninger in  
regard to the sale of this house? A. I asked him if he would  
12 consider another one in exchange, and he said no, a little  
varied proposition from the one I had at that time. There  
was a cash offer at that time, too, some cash in connection with the  
exchange.

Q. You took the deposit of the purchaser in this case on a trade proposition, did you not? A. I did; yes, sir.

Q. You did not take any deposit on a sale proposition? A. I did not; no, sir.

Q. After you found out that you could not work this trade you returned the deposit, did you not? A. I did not, until I tried to get him to make a proposition of sale, and he said he could not buy the house because he did not have the cash to do it.

The witness then testified, that he returned the deposit which Mr. Shepard had made to him giving the date of the return of the deposit as about the 17th of January, 1907."

Q. What efforts did you make to negotiate a sale after you returned that deposit? A. I went back to him about three days after that. I told him at the time I left him, I says, "Mr. Shepard, I would like, if possible, for you to arrange in some way to get money enough to buy this house. You do not need much money to buy it," and I said, "So, if you can find some way to raise the cash, I will be in in a few days," and in a few days I did go back to see about this particular house, and when I called on him he said, "Well,  
13 I have bought a house," and I says, "is that so? What house did you buy?" He said "The house you showed me." I said "Who did you buy it from?" He said "From Breuninger." I said "Why did you do that?"

To further maintain the issues on its part joined the plaintiff offered as a witness WILLIAM A. HILL, its President, who testified that when the matter was brought to his attention on or about February 18th, 1907, he immediately notified Breuninger in the following words and figures of the demand for commission, on the ground that they had been the procuring cause of Sheppard's purchase of the house?

FEBRUARY 18TH, 1907.

W. A. H.

Mr. Lewis E. Breuninger, 1122 Lamont St. N. W., City.

DEAR SIR: We have learned that you have sold premises No. 1234 Irving St., Columbia heights to our customer, Mr. H. L. Shepard. Mr. Shepard learned of this house through us and made several propositions for it, which we submitted to you.

We wish to notify you that we shall expect commission on this sale.

Very truly yours,

MOORE & HILL (INC.),  
By — —, President.

14 He also stated that the regular commission for sales of this character in the District of Columbia was three per cent. on the amount.

Thereupon the plaintiff offered in evidence the record of the Deed from Breuninger to Sheppard conveying the house in question, which bore date the 20th day of February, 1907. It was thereupon admitted by counsel for the defendant that the house 1234 Irving

St. was sold by Breuninger to Sheppard and a deed of the foregoing date delivered to Sheppard by Breuninger.

Thereupon the plaintiff rested.

This is the substance of all the evidence offered on behalf of the plaintiff in chief, the witness A. S. Gardiner only being called again in rebuttal.

Thereupon the defendant to maintain the issue on his part joined, offered as a witness H. L. SHEPARD, who testified that he is a clerk in the Treasury Department and purchased the house, 1234 Irving street; that his attention was first called to the house by the Rev. Dr. and Mrs. Power in November, 1906, about a week before Thanksgiving. That Dr. Power is the pastor of his church. That he is one of the oldest members of Dr. Power's church, and had charge of the singing and was associated a little closer with Dr. Power than a good many other members of the church. That Dr. Power sold his house on Wallach place and bought the house 1236 Irving street. That when Dr. and Mrs. Power bought their house on Irving street they asked witness to come up and get the house next to them. That he told them that he could not buy the house unless he could trade in his house on Tenth street, but he went up with Mrs. Power and another friend and looked at Dr. Power's house before they 15 moved into it and went again after they moved in and looked all through it, also through the next house 1234 Irving street; Dr. and Mrs. Power told the witness that Mr. Breuninger was the owner of the house next to theirs which witness finally bought, and told him the purchase price they paid for their house on Irving street. That both houses were alike so far as value is concerned. That it was the latter part of December that he first went to the offices of Moore and Hill. In regard to what took place at the office of Moore and Hill the witness testified as follows:

Q. Tell what occurred there when you went there? A. I went there to return a key of a house on Ontario place.

Q. No, I mean when you first went there. A. This was the occasion, and I met Mr. Gardiner there as I was coming out, and he suggested that he would like to show me some other houses, and he mentioned houses on Irving street. I knew of those houses. I told him I would look at them and let him know, but I could do nothing except trade; I was not situated so I could buy. I had a house I would be very glad to trade for one of those houses, or any house that was satisfactory. I had seen other houses and had had trade propositions; I do not know if I told him that, but that was my situation at the time. He said that he would like to take me up there then, which was long after the office had closed, and I said "Well, I must be getting home and I can look at them any time." He says "I have the automobile out here; I can take you right up there."

16 He rather insisted, and I went up and looked at the house with him, and he said he could make a trade, he thought, and we talked it over, and I told him well, I would take my wife up there and look at it, and if it was satisfactory to her I would talk with him further about it. He said to name a date and he would

come around in his automobile and take us up. I did so, and we went up the second time and looked it over with my wife. She did not find any serious objection, and a few days after that I gave him a check for a deposit on the house on a trade proposition.

Q. Go ahead and tell what took place after that. A. And then I would see him occasionally and he would tell me he thought that matters were progressing satisfactorily, and finally he came to me and said that Mr. Breuninger had refused to trade; he could not make a trade with him. I do not know that he said that Mr. Breuninger would not trade, but he could not carry the trade through; he could not make the trade, and he gave me back the check.

Q. Can you fix the date when he gave you back that check? A. I cannot definitely; I gave him the check on the 7th day of January.

Q. 1907? A. 1907, and I should suppose it may have been ten days afterwards, somewhere along there.

Q. What did he say when he gave you back the check?  
17 A. I do not know exactly the language that he used, but that the understanding was that the—

Mr. LAMBERT: I object to the understanding.

The COURT: State what was said and let the jury determine what the understanding was.

The WITNESS: This being so long ago, I cannot remember the exact language.

By Mr. BROWN:

Q. Give the substance of it.

The COURT: Give your best recollections, if you have any recollection.

A. That the trade would not be consummated, that I could come up to the office and get the check, and that would close the proceedings.

By Mr. BROWN:

Q. What did they do after that? Did they get any other proposition or agreement from you than that? A. No sir; that ended it as far as I was concerned.

Q. Did you have any negotiations with Moore & Hill about the sale of this property after the return of that check? A. No sir.

Witness then stated that on the 31st of January, 1907 he borrowed five hundred dollars on a life insurance policy and bought the house from Mr. Breuninger by paying five hundred dollars cash and twenty-five dollars a month, and further testified as follows:

Q. Did you have this five hundred dollars you paid in  
18 cash at the time when you were first interested in this property?

To this question counsel for the plaintiff objected on the ground that it was immaterial, but said objection was overruled and exception noted, and said exception was duly entered upon the minutes of the Court.

A. I did not have it.

Q. When did you get it? A. I got it on the 31st day of January.

Q. How did you get it? A. I got it from the Equitable Life Insurance Company.

Q. What did you get it on? A. I had a policy that I borrowed the money on.

Q. How did Moore & Hill come to return this deposit to you? State the circumstances. A. Because they failed to make the deal, the trade.

Q. Did they make any other proposition to you for the purchase of this property, after they returned the deposit? A. No, sir.

Q. Any at all? A. None at all.

Q. Did you have any other dealings with them with regard to this property after they returned that deposit. A. No, sir.

Q. Did Dr. Power or anyone else take up the matter of the purchase of this house with you after that deposit had been re-  
19 turned to you by Moore and Hill?

Mr. LAMBERT: I think that question is leading

The COURT: Ask him if he took up the question of purchase.

By Mr. BROWN:

Q. Did you take up the matter of the purchase of this property again with other persons after Moore and Hill had returned you the deposit? A. I went to Mr. Breuninger about it.

Q. Did you see anybody else about it? A. I was advised—

Mr. LAMBERT: Now, one minute. What he was advised I submit is not competent.

By Mr. BROWN:

Q. My question is, did anyone else talk to you about it besides Mr. Breuninger? A. Yes.

Q. Who? A. Mr. and Mrs. Power.

Q. What did they have to say to you, what did they do about it?

Mr. LAMBERT: I object.

By Mr. BROWN:

Q. Did they take you up there again? A. Yes, sir. My wife and two boys and myself went up there afterwards, yes, and looked their house through and this house.

That his wife and two boys and the witness went up there afterwards and looked through Dr. Power's house and the house  
20 he purchased and that Dr. and Mrs. Power advised him to see if he could not buy the property from Mr. Breuninger. That then he went to see Mr. Breuninger; that he had a slight acquaintance with Mr. Breuninger before that, and that he saw Mr. Breuninger.

On cross examination witness testified that he went to the office of Moore & Hill to return a key of a house on Ontario street which he had looked at and which house did not suit him; that his first

visit to Moore & Hill was for the purpose of getting that key. That this was the occasion when he met Mr. Gardiner.

Thereupon the witness testified as follows:

Q. When you brought back that key you saw Mr. Gardiner, did you? A. Yes sir.

Q. Did you know Mr. Gardiner before that time? A. No sir.

Q. You began talking with him about houses, or he began talking to you? A. He began talking with me after I had returned the key to the clerk.

Q. And he told you about different houses they had for sale, did he not? A. He mentioned these houses.

Q. Mentioned this Kenyon Street house, did he not? A. No, sir.

Q. He did not mention that at all? A. No sir.

Q. Did he mention the Irving street houses? A. Yes, 21 sir.

Q. He told you about those, did he? A. Yes, sir.

Q. You did not like this Ontario Street house, did you? A. No sir.

Q. You told him you did not like it? A. I don't know as I told him; I told the clerk I returned the key to.

Q. And thereupon you entered upon this conversation about these other houses, and he brought to your attention 1234? A. Yes, sir.

Q. And offered to take you up there that evening? A. Yes, sir.

Q. And you went up there that evening with him? A. Yes, sir.

Q. When he brought this to your attention, about 1234, did you tell him you knew anything about it before? A. I couldn't say definitely now whether I did or not.

Q. And he took you up there and took you through? A. Yes sir.

Q. You did not say anything to him about Mr. Power, did you? A. Nothing more than that I knew Mr. Power lived next door; that I was acquainted with him.

Q. That is the conversation; that you were acquainted 22 with Mr. Power? A. Yes.

Q. When you went there about this Ontario street house, you did not say anything about trading houses, did you? A. I did not say anything at all.

Q. No, you just got the key? A. To see whether I would like to trade for it or not.

Q. The advertisement in connection with the Ontario street house that attracted your attention did not say anything about trading, did it? A. That I do not know now; I could not say.

Q. Do you not know that there was not anything in there about trading? A. I do not know it.

Q. What is your best recollection on it? A. I have not any recollection at all whether it had it or not.

Q. So, without knowing whether there would be any trade considered or not, you went there to talk about the purchase of this

Ontario Street house, if you liked it, did you not? A. No, sir, I do not think I did; I went there to look at the houses—

Q. What was your object in looking at the house if you did not contemplate acquiring it?

Mr. BROWN: Let him finish the answer.

Mr. LAMBERT: I thought I did.

23 A. At that time I had had several propositions from other parties about trading for the house, and I knew in a general way that real estate agents would trade houses, would make a deal, and I had several under consideration at that time, and if I wanted to know about it. I did not ask whether this house could be obtained by trade before I went to see the house, because it would be useless if the house did not suit me. What was the use of entering into any arrangements without knowing whether they would trade it. For that reason I went up to see that house the same as I had seen others. Stone & Fairfax had this same house at the same time.

Witness then in response to questions by Mr. LAMBERT testified as follows:

Q. You did not say anything to Mr. Gardiner, of course, before you went up there with him to see this 1234, about this idea of trading? A. Yes, I think I said it was not any use to go to see any house unless I could trade for it.

Q. You told him that before you went up there at all? A. Yes sir.

Q. Before you went up there with him? A. Yes sir.

Q. Did you see Mr. Power the night you went up there? A. No sir.

Q. On the following Sunday you did not talk terms at all, did you, when you went there with your wife and two children?  
24 A. Not terms, no sir.

Q. On the following day, Monday, Mr. Gardiner came to see you, did he? A. I think so; I could not say whether it was Monday or Tuesday; he came shortly after.

Q. And then it was that you made this proposition to him that you would like to trade? A. No sir, I spoke of the trade before that, when I first saw him, that I would trade my house for property.

Q. Was anybody present at that interview when you say you said you wanted to trade in the beginning? A. No sir.

Q. You followed the conversation up, then, on Monday, and offered him terms; is that it? A. The following Monday after having seen the house?

Q. Yes. A. I do not know that I offered him terms, but we talked the matter over and agreed on some terms.

Q. That was about the 7th of January, was it not, 1907? A. That was the date that I made the deposit; whether that was the day or not—I may have made the deposit the next day; I do not know how that was.

Witness then stated that after having made the deposit he dropped in the office of Moore and Hill several times and asked how the trade was getting on, and that about ten days after he made the deposit  
that it was returned to him with — statement that they could  
25 not make the trade, and that he went to Moore & Hill's office to get the check, and further testified as follows:

Q. You are sure about that. Then you had a conversation with him at the time he told you that proposition would not be accepted? He came up and had a conversation with you anyway, did he not?  
A. Yes sir.

Q. Tell me just what was said at that conversation; this was along about the 17th day of January, as near as you can recollect it?  
A. As near as I can recollect, the substance of the conversation was that he could not carry the trade through, and I said, "Well, I will come around and get my deposit," and he said "Yes." That was all that I can say that we said. What may have been said incidentally I could not say.

Q. Now, when did you next see Mr. Gardiner? A. I did not see him until along the latter part of February.

Q. The latter part of February? A. Yes.

Q. You think you did not see him from about the 17th or 20th of January until about the latter part of February? A. No sir.

Q. You do not think you saw him? A. No sir.

Q. Are you not mistaken about that; did he not call after that?  
A. No sir.

Q. He asked you to make a proposition for the house did  
26 he not? A. No sir.

Q. Other than the trade? A. No sir.

Q. He never asked you about making any other proposition? A. No sir, I told him I could not.

Q. Oh, you forestalled that? A. I could not do anything but make a trade; that was the only condition.

Witness then stated that he had had the insurance policy on which he borrowed money for about twenty years. That it was a semi-tontine policy for the amount of four thousand dollars. That he made application for the loan on the policy in the latter part of January, about a week before he got the money. That he obtained the loan on the policy on the 30th of January, 1907, and made application for it about the 22nd or 23rd. That he first saw Mr. Breuninger about the Tenth of February, 1907.

Thereupon the following testimony was given:

Q. You went to see him after you got the money? A. Yes sir.

Q. You obtained this money for the purpose of making a deal for the property, did you not? A. If I could.

Q. You wanted to put yourself in shape by getting this money, and then you went to see Mr. Breuninger; is that it? A. Yes sir.

27 Q. So that when you arranged to get it from the Company you had that in mind? A. That was my intention.

Witness then states that he moved into the house on Irving Street

on the 22nd of February. That at that time he had not sold his house on Tenth street, but that he has sold it since. That he had not sold it up to the time he made the deal for the house on Irving Street.

Q. Can you give me some idea as to what was the first time you went up to see this house in Irving Street, about the 20th of January? A. No.

Q. You cannot give me any idea about that? A. No.

Q. Can you tell me whether or not, between the 10th of January and the 20th of February, you went up to see this house again? A. No sir, I could not say definitely about that, even.

Q. You could not say whether you did or not? A. No sir.

Witness was also asked whether Mr. Breuninger, the owner of the house bought by witness, inquired of witness whether he came through any real estate brokers when witness went to see Breuninger about the purchase of the house, but to this question counsel for the plaintiff, Moore & Hill, objected, which objection was sustained by the court and defendant excepted which was duly noted on the minutes of the court.

Thereupon Rev. FRED. B. POWER, a witness, produced on  
28 behalf of the defendant, having been first duly sworn, was  
examined and stated that Mr. H. L. Sheppard is a member of  
his church; that he has known Mr. Sheppard for thirty-three years;  
that in November, 1906, he purchased house numbered 1236 Irving  
Street; that witness and his wife naturally wanted good neighbors,  
so he spoke to Mr. Sheppard and his wife did also and asked Mr.  
Sheppard to come up and look at this property. Mr. Sheppard  
came the same day that witness and his wife spoke to him; that was  
in the latter part of November or the first of December. Later Mr.  
Sheppard brought his wife and visited the house and soon after he  
brought his son and his son's wife and they went over the property  
and witness and his wife urged Mr. Sheppard to come and live next  
door to them. They had been very close friends and his wife was a  
close friend of Mrs. Sheppard and they were very anxious to have  
good friends close to them. Mr. Sheppard took the house from Mr.  
Breuninger. Witness and his wife advised Mr. Sheppard to see  
Mr. Breuninger and arrange for it and he did so and purchased it.  
That witness moved into his house about the first week in December;  
that he closed his deal with Mr. Breuninger for his house about the  
25th of November. Witness spoke to Mr. Sheppard about his house  
before witness moved into his house. It was some time in the latter  
part of November when witness spoke to Mr. Sheppard about the  
house Sheppard bought. It was about Thanksgiving when witness  
first spoke to Sheppard about the house. Witness thinks it was be-  
fore Thanksgiving. Witness and his wife continued their efforts  
to get Mr. Sheppard to buy the house 1234 Irving Street, and  
29 also talked to Mr. Breuninger on the subject. Witness fur-  
ther testified as follows:

Q. Can you tell us what conversations you had with Mr. Sheppard

between the seventh of February and the twentieth, when he purchased it? A. I cannot recall any conversation especially.

Q. Did you have any conversation between those dates? A. I do not recall. I think we had conversations all through the period from the time we moved in until the time Mr. Sheppard came to the house, but I could not recall any special matter that came up.

Q. How long before you bought the house did you have the last conversation with him about buying it? A. I could not tell you that, sir.

Q. Did you know when he was negotiating with Mr. Breuninger for the purchase of the house? A. Yes, sir.

Q. Did you talk with him at that time? A. Yes, sir.  
On cross examination witness testified that about a week before Thanksgiving witness went up to the house on one occasion and that Mr. Sheppard accompanied him; that on that occasion they went through both houses; that of the witness and the one Mr. Sheppard afterwards purchased; that witness was anxious to get a good neighbor and that that was his sole motive; that witness first met Mr. Breuninger in arranging for the sale of the house witness bought. That he purchased his house through an agent.

30 That witness first spoke to Mr. Breuninger about Mr. Sheppard while Mr. Breuninger was adjusting things at his house and before he moved into his house; that witness talked to Mr. Breuninger about Mr. Sheppard as soon as he talked to Mr. Sheppard. Witness told Mr. Breuninger that he wished to get good neighbors and told him about his friend, Mr. Sheppard. Witness then testified as follows:

Q. Did you tell Mr. Breuninger who your friend was? A. Yes sir.

Q. What did you talk about; did you attempt to negotiate a price? A. Oh, no; I do not think we had anything to do with that at all. We simply advised Mr. Shepard to purchase the house. We thought it suited him and his family and we wanted them for neighbors.

Q. You did not have anything to do with the price at all? A. We had nothing to do with adjusting the price; we told him to see Mr. Breuninger and negotiate directly through him.

Q. You made no effort at all to carry the deal through for Mr. Breuninger so far as the finances were concerned? A. Oh, no sir; I am not in the real estate business, Mr. Lambert.

Q. You had no interest in the world in Mr. Breuninger except your idea was to get a good neighbor? A. That is all. We liked Mr. Breuninger and we liked to help him in any way.

31 Q. You never were paid any commission for it? A. No sir.

Mr. LAMBERT: That is all.

Redirect examination.

By Mr. BROWN:

Q. Did you tell the purchaser the price of your property and the terms under which you bought it? A. Possibly we did; I think we did; I am sure we did.

Q. You say you are sure you did? A. Yes sir, that is my memory.

Recross-examination.

By Mr. LAMBERT:

Q. Doctor, would you mind telling us what you did pay for your house?

Mr. BROWN: I object to that.

A. I think that is hardly a question to be answered.

The COURT: The objection is sustained.

The WITNESS: I wish to say in reference to a statement of the price to Mr. Sheppard, I am not sure about that; I am not sure whether we told him what we paid Mr. Breuninger or not, but I think it is very likely we suggested if he would go to Mr. Breuninger direct he would get better terms possibly not have to pay a commission. It is very likely we did that.

Thereupon the defendant, LEWIS E. BREUNINGER, took the stand as a witness on his own behalf, and testified that he was the 32 owner of the property mentioned in this suit; that he had no special agreement with Moore & Hill in regard to that property; that they knew he built houses, and asked him if they could sell the houses; that he told them if they could get \$7,000 for them they could sell them; that he gave them so special authority to sell them any more than other real estate men, because there are various men, in fact various men sold those houses, and he sold some himself. He reserved the right to sell them himself in case he has a man to buy them; that the terms of sale of this house were \$7,000, and he told Moore & Hill that he would consider an offer, but they never had any order from him to trade because he does not trade; he can sell a new house better than an old one; they all understand that he never traded houses; that he knows Mr. Sheppard and sold him the house in question; that he learned that Mr. Sheppard was a possible buyer from Dr. Power sometime in November, after the 20th of November of 1906; that he had sold Dr. Power a house through another firm, and Dr. Power called his attention to his friend, Mr. Sheppard; that he asked Dr. Power to see Mr. Sheppard, and gave Dr. Power authority to negotiate with Mr. Sheppard, and induce him to come up and buy the house; that he talked to Dr. Power and his wife about the proposed purchaser, Mr. Sheppard. Witness then testified as follows:

Q. State what negotiations you had with Mr. Shepherd about the sale of this house. A. Well, my negotiation with Mr. Shepherd was along about the 20th of February. I do not know whether 33 that is the exact date or not, just about a week before the transfer was made. I think the transfer was made on the 20th of February, as well as I can remember. I have it down. I think that was the date.

The WITNESS: About a week previous to that. I had known of

Mr. Shepherd through Dr. Power, and had been negotiating between that time and the time Mr. Shepherd came to me through Dr. Power, and when Mr. Shepherd came to me and made the offer for the house, I contracted with him and sold him the house. Witness then testified as follows:

Q. You say you were negotiating with Mr. Shepard through Dr. Power for the sale of this house? A. Yes, sir.

Q. Did you have any negotiations through Moore and Hill with Mr. Sheppard for the sale of this house? A. No, sir.

Q. Any whatever? A. No, sir.

Q. Did they ever introduce Mr. Sheppard to you? A. No, sir.

Q. When you closed this sale with Mr. Sheppard, did you inquire of him whether he came through any broker, as the result of any broker's efforts? A. Yes, sir; I asked him if a broker had spoken to him about the house before Dr. Power had called his attention to it, before we were negotiating. He said they had not.

Q. Did you ask him if any broker had any right to make any claim for commission?

Mr. LAMBERT: I object.

34 The objection was sustained and the defendant duly excepted through his Counsel, and said exception was noted on the minutes of the Court.

On cross examination witness stated that Dr. Power moved into his house in the latter part of November, around about Thanksgiving; that he knew Dr. Power was not a real estate agent, and did not pay him any commission, but every man has his friends and every man has his influence with his friends, and witness frequently sells houses through people just that way. It was about a week before Dr. Power moved into his house that he first told witness about Mr. Sheppard and that he wanted to get him interested in the house next door; witness did not go to see Mr. Sheppard. That he saw Dr. Power right along, frequently after that every week; during that time did not go to see Mr. Shepard at all. Witness remembers receiving a proposition to trade from Moore and Hill, but thinks he received it through the mail; does not know. Witness stated that he is receiving propositions every day on houses, and he remembers receiving the trade proposition from Moore and Hill along with others, but that he never entertained it, and that Moore and Hill knew that he would not entertain it when they sent it; that the Moore and Hill proposition contemplated a trade of some house on 10th Street and witness told them that he would not make a trade; that Moore and Hill and Mr. Gardiner did not mention Mr. Sheppard's name to witness, and he did not know whose house the house on 10th Street was. Witness then testified as follows:

Q. Do you know as a matter of fact that Mr. Gardiner called on you in reference to this proposition, and that he submitted 35 it to you, and that he told you who it was who was making the proposition? A. No, sir; they never mentioned Mr. Sheppard's name at all.

Q. You are not positive whether he called on you or not, but you are quite certain you never heard Mr. Sheppard's name? A. I have never heard Mr. Sheppard's name in connection with Moore and Hill.

Q. Do you not think, in connection with all these offers, that the name might have been mentioned and you not remember it? A. As I say, I never remember it, and never had any account of the letter, and never connected that house with Mr. Sheppard.

Q. You are not prepared to say that Mr. Sheppard's name was mentioned, or is it that you do not recollect? A. I am quite sure that his name was never mentioned to me—

Mr. BROWN: That is objected to.

The WITNESS (continuing): by Moore and Hill. They frequently offer trade propositions, but never give the owner's name.

By Mr. LAMBERT:

Q. I know, but you are not positive whether Mr. Gardiner called on you or not? A. He may have brought the letter, but I don't think he did.

Q. If he did, how positive are you that he did not mention Mr. Sheppard's name to you? A. Because I never heard Mr. Sheppard's name through Moore and Hill's firm.

Q. But you had heard it before that? A. Yes.

Q. How positive are you that he did not mention it, if he did call on you? A. I heard his name from Dr. Power.

Q. How positive are you that Mr. Gardiner did not mention it to you? A. I am just as positive that I never heard it.

Q. You did not see Mr. Sheppard at all in connection with this transaction until sometime in February; is that true? A. No; I was transacting through Dr. Power.

Witness then stated that he transferred the house on Irving Street to Sheppard about the 20th of February and that it was about a week before that date that he first saw Sheppard about the purchase of the house; that he had two conferences with him before he closed the transaction. That when he first met him he asked him if any one besides Dr. Power had spoken to him about the property. That this was in the neighborhood of a week or ten days before he transferred the property to Sheppard. Sheppard told witness that Dr. Power had called his attention to the house. Witness asked him if any real estate men had and Sheppard said no.

Thereupon A. S. GARDINER, a witness on behalf of the plaintiff, having been heretofore duly sworn, was recalled in Rebuttal and testified to certain entries in a book produced by the plaintiff showing that Sheppard first called at the offices of Moore and Hill on December 22 and that Sheppard called at the offices of Moore and Hill after that date, and that the witness received the deposit on a trade proposition from Mr. Sheppard on the 7th day of January, 1907, and about the 17th day of January, witness returned said deposit to Sheppard. Witness testified that

when he gave Sheppard back the check he told him at that time that he could not consummate the deal. Witness was further asked if when he returned the check he did not say to Mr. Sheppard that that would close the proceedings, or words to that effect, and replied that he did not. Witness was asked whether he took the trade offer of Mr. Sheppard to Mr. Breuninger personally or sent it by mail, and replied that he took the offer to Breuninger.

Mr. LAMBERT: That is our case.

And this was the substance of all the testimony offered on behalf of the plaintiff and defendant.

Whereupon plaintiff offered the following prayer:

"The jury are instructed as matter of law that in determining whether or not the plaintiff was the procuring cause of the sale spoken of in this proceedings, they may take into consideration, if they so find, the exertions and efforts made by the plaintiff to sell this property to Shepard, the information given to him by the plaintiff, and anything done by plaintiff or its agent to stimulate the interest of Shepard in this property with a view to a purchase of it, and whatever else that may appear to have been done by the plaintiff in an effort to secure the purchase of the property by Shepard."

38 To this prayer defendant through his counsel then and there objected at the time it was offered, which said objection was sustained by the Court and exception duly noted, and said exception then and there and at the time it was taken, entered upon the minutes of the court.

Thereupon the court granted the following prayer requested by the plaintiff:

"If the jury believe from the evidence that the plaintiff's agency was the procuring cause of the negotiation between the defendant and Mr. Shepard, which resulted in a sale to him of the defendant's property, the plaintiff is entitled to recover, even though the jury may further find that the negotiations and consummation of the sale was had with the defendant when plaintiff was not present and without defendant's knowledge that the plaintiff's agency was the procuring cause of said sale or negotiations."

Thereupon the following prayer offered by the defendant was conceded and for that reason granted by the Court:

"The jury is instructed that where an owner merely authorizes a real estate broker to find a purchaser for a certain price the law implies a reservation by the owner to sell on his own account and free of charge for commission, to a purchaser not procured by the broker."

Thereupon, the court charged the jury as follows:

39 "Gentlemen of the jury, the plaintiffs, Moore & Hill, bring this suit against the defendant to recover commissions which they say they are entitled to upon a sale of the defendant's property to one Shepard for the sum of \$6,800. They claim a commission of 3 per cent. upon that amount, upon the theory that they were the procuring cause of that sale; in other words, that they pro-

cured the purchaser and occupy the position of one who sold the property as the agent of the owner, by virtue of the facts and circumstances as they came to you in the course of this trial. There is no dispute here that Mr. Breuninger authorized the plaintiffs to sell the property if they could get his price, nor is there any dispute that the owner, Mr. Breuninger, authorized other real estate agents to sell the property if they could get his price.

The defendant says that the plaintiffs had nothing whatever to do with the sale of this property; that it was sold by the defendant himself; that the purchaser was not introduced to him by the plaintiffs, but was introduced to him by Rev. Dr. Power as early as November, 1906, and that negotiations were then pending between the owner, the defendant in this case, and the purchaser, Mr. Shepard, during that month, and prior to any attempt on the part of Moore & Hill to deal with the property itself, the testimony being, which, I believe, is undisputed, that their first attempt to deal with the property was in December, 1906, that they then endeavored to exchange a certain piece of property, or rather to induce the owner, the defendant here, to dispose of or sell the property to Mr. Shepard and take in part payment therefor some house that he owned here in this city, and that the owner absolutely refused to deal  
40 with the property upon that basis.

I have said that there is no dispute here that Moore & Hill were authorized to sell the property if they could get the owner's price, but it is proper that I should say to you in this connection that the owner of the property reserves to himself, and the law reserves that right to him whether he expressly reserves it or not, to sell the property himself if he can find a purchaser who is willing to pay his price, and which purchaser he himself had procured. Therefore, I have granted this instruction, that where an owner merely authorizes a real estate broker to find a purchaser for a certain price, the law implies a reservation by the owner to sell on his own account and free of charge for commission to a purchaser not procured by the broker. That is what I mean by what I have just said to you.

Now, gentlemen, if you believe from the evidence that the plaintiffs' agency was the procuring cause of the negotiation between the defendant and Mr. Shepard which resulted in a sale to him of the defendant's property, the plaintiffs are entitled to recover even though the jury may further find that the negotiations and consummation of the sale were had with the defendant when plaintiffs were not present, and without defendant's knowledge that the plaintiffs' agency was the procuring cause of said sale or negotiations.

On the other hand, gentlemen, if you find from the evidence that Dr. Power secured and introduced the purchaser to the defendant,  
41 and as a result thereof the defendant entered into negotiations with such purchaser—Shepard, in this case—for the sale of this property prior to the time that the plaintiffs had brought the property to the purchaser's attention, and that the sale of said property was made by the defendant as the result and outcome of a continuation of the negotiations theretofore entered into

and brought about by the efforts of Dr. Power, then your verdict shall be for the defendant. In other words, if you are satisfied from a preponderance of the evidence that Shepard was first introduced to the defendant here by Dr. Power as a probable purchaser, and that negotiations were entered into between them and were being carried on prior to the time the plaintiffs undertook to deal with this property, and that Shepard bought the property as a result of said negotiations theretofore pending between the defendant and Shepard, and subsequently continued until the sale was made by the defendant himself to Shepard, then your verdict must be for the defendant because in that view of the case it could not be said that the purchaser had been procured by the plaintiffs, that he had been introduced by the plaintiffs, or that they were the procuring cause of the sale.

In determining whether the plaintiffs were the procuring cause of the sale, you may take into consideration the exertions and efforts made by the plaintiffs to sell this property, if you find that they did make any effort to so do; you may take into consideration all that they said and did in connection with the property, and determine whether they were the procuring cause of the sale; or, on the other hand, taking into consideration all the facts and circumstances,

42 determine whether the sale was made through the introduction of the purchaser to the defendant by Dr. Power and as a result of negotiations between them independent of these plaintiffs. If you believe from the evidence that all the proposed purchaser, Shepard, did in his negotiations with the plaintiffs, Moore & Hill, was to agree to take the property, provided the plaintiffs could make a trade of other property in part payment of the purchase price, which proposition was submitted by the plaintiffs to the defendant and declined by him, and that plaintiffs then stated to Shepard that they could not make said sale or exchange of the property on said terms, and thereupon returned the deposit to the purchaser, and that prior thereto defendant had been negotiating with said purchaser for said sale to him of said property, and that as a result thereof the defendant subsequently sold said property to said purchaser upon his, the purchaser's, own offer, and with which offer the plaintiffs had nothing to do, then your verdict must be for the defendant.

Gentlemen, the burden of proof here is upon the plaintiffs to satisfy you that they are entitled to the commission for which they sue. You must take this evidence as it has come to you from the witness stand and apply to it the rules of interpretation as I have given them to you. You might think that the law was otherwise, or ought to be, but you have nothing to do with that. The responsibility of interpreting the law in the case is with the court; the responsibility of interpreting the facts is with you. You are the sole judges of the facts.

43 If you should find for the plaintiffs, your verdict should be for the plaintiffs for the sum of \$204. If your verdict is for the defendant, it should simply be for the defendant."

Mr. LAMBERT: May it please the Court, of course we want our ex-

ceptions to the granting of defendant's prayers and to the refusal of ours, and to that part of your Honor's charge which says "If you find from the evidence that Shepard was first introduced to Breuninger by Dr. Power," and so on down to the end of that instruction. We except on the ground that there is absolutely no evidence to justify an instruction of that kind. There is no evidence here that Dr. Power ever introduced Mr. Breuninger to Mr. Shepard; there is absolutely none.

Mr. BROWN: I differ from you on that.

The COURT: I am willing to leave that proposition to the jury. Dr. Power testified that he spoke to the defendant about Mr. Shepard.

Mr. LAMBERT: But not that he ever introduced him or had any negotiations for him at all. Dr. Power said he simply spoke to Mr. Breuninger about Mr. Shepard.

The COURT: And that he spoke to Mr. Shepard about the property and urged him to buy the property.

Mr. LAMBERT: Dr. Power said he absolutely took up no negotiations for the sale of that property. It is admitted that there was no negotiation between Mr. Breuninger and Mr. Shepard direct until the tenth day of February.

The COURT: I will leave that to the jury.

The COURT: You may retire, gentlemen.

(The jury thereupon retired to consider of their verdict.)

Mr. LAMBERT: There was one other point there, that part of your Honor's instruction which stated to the jury that if the whole thing terminated with this offer of trade, then Mr. Shepard would have a right to take the matter up with Mr. Breuninger; to that part of your Honor's charge we want an exception.

The COURT: I cannot recognize any exceptions now, after the jury has gone out.

Mr. LAMBERT: I was trying to get that in, may it please the Court, but the jury was discharged before I could get my statement in.

And all of the exceptions hereinbefore referred to were noted on the minutes of the court as they were severally taken and the plaintiff prays the court to sign and seal this, its Bill of Exceptions, to have the same force and effect as if the rulings herein contained were set out in separate Bills of Exception, which is accordingly done this 8th day of March, A. D. 1909, *nunc pro tunc*.

THOS. H. ANDERSON, *Justice.* [SEAL.]

45 *Directions to Clerk for Preparation of Transcript of Record.*

Filed March 8, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 49418.

MOORE & HILL, Inc.,  
*vs.*  
LEWIS E. BREUNINGER.

John R. Young, Esq., Clerk:

Please include in the Transcript of Record for the Court of Appeals in the above entitled cause, the following pleadings:

1. Plaintiff's Bill of Particulars.
2. Verdict for defendant.
3. Motion for new trial overruled and judgment.
4. Bill of Exceptions.
5. Appeal bond.

WILTON J. LAMBERT,  
*Attorney for Plaintiff.*

*Memorandum.*

March 10, 1909.—Time in which to file Transcript of Record in Court of Appeals further extended to April 15, 1909, inclusive.

## 46 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 45 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49418 at Law, wherein Moore & Hill, incorporated is Plaintiff and Lewis E. Breuninger is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 13th day of April A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 2006. Moore & Hill, incorporated, appellants, *vs.* Lewis E. Breuninger. Court of Appeals, District of Columbia. Filed Apr. 14, 1909. Henry W. Hodges, clerk.